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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOVEREIGN NEWS COMPANY,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, pursuant to the principles announced in Franks v. Delaware, 438 U.S. 154 (1978) and Lo-Ji Sales, Inc. v. New York, 442 U.S. 379 (1979), a warrant containing a magistrate's knowing misstatement of material fact is invalid under the Fourth Amendment?

II. Whether in issuing a warrant for the seizure of materials on the basis of a general representation in an affidavit that a group of films and magazines contained explicit sexual acts, together with a cursory viewing of some of the magazines and "spot-check" of some of the films, the magistrate performed his constitutional duty to focus searchingly on the question of obscenity as required by Marcus v. Search Warrants, 367 U.S. 717 (1961)?

QUESTIONS PRESENTED FOR REVIEW (CONT.)

III. Whether a warrant issued on the basis of an affidavit insufficient to establish probable cause and containing information unlawfully obtained by the government was issued in contravention of established Fourth Amendment principles?

IV. Whether a court can allow the government's use of certain materials seized pursuant to an overbroad warrant by redacting the overbroad language after the search has been conducted?

V. Whether a generic description of business documents is sufficient to satisfy the particularity requirement of the Fourth Amendment?

VI. Whether the bad faith, general search of petitioner's premises requires the return of all documents, including any copies of documents, seized in the course of the search?

PARTIES

There are no parties other than those listed in the caption of the case in this Court. Sovereign News Company has no parent companies or affiliates nor does it have any subsidiaries which are not wholly owned.

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In The
Supreme Court of the United States
October Term, 1982

No. _____

SOVEREIGN NEWS COMPANY,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Sovereign News Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at 690 F. 2d at 569, and is set

forth in the separately bound Appendix at A-3. The unreported opinion of the United States District Court for the Northern District of Ohio is set forth in the Appendix at A-42.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on October 6, 1982. The Court of Appeals denied petitioner's application for rehearing on November 3, 1982 and denied respondent's application for rehearing on January 11, 1983. This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States is set forth in the Appendix at A-182. The Fourth

Amendment to the Constitution of the United States is set forth in the Appendix at A-183.

STATEMENT OF THE CASE

This petition seeks review of the judgment entered by the United States Court of Appeals for the Sixth Circuit which affirmed the order of the United States District Court for the Northern District of Ohio finding that the searches and seizures of petitioner's premises were lawful and denied petitioner's motion for return of the materials seized.

On March 19, 1975, and again on March 26, 1975, more than twenty federal agents, acting under color of search warrants, rummaged through petitioner's entire three-floor premises for more than ten hours. They trucked away three copies of thirty-four different films and more than two thousand pages of business documents. They also hand-copied dozens of

other documents and took photographs of anything they thought relevant.

Following the searches, petitioner filed two complaints in the United States District Court for the Northern District of Ohio, seeking return of the materials seized. (App. at A-74, A-83). Petitioner's complaints were grounded upon numerous violations of the Fourth Amendment that had occurred in the conduct of the March 19th and 26th searches. The events of these two searches are set forth below.

The first search occurred on March 19, 1975, under color of a search warrant issued the preceding day by a federal magistrate (App. at A-92). The affidavit in support of this search warrant recited the facts surrounding the interception of three cartons of magazines and 8mm films allegedly shipped from petitioner's premises to Fort Worth, Texas (App. at A-102). The titles of forty-nine magazines

and ten films were listed, and the affiant described the materials as explicitly depicting ultimate sexual acts (App. at A-108 - A-109). The affidavit contained no other information concerning the materials' contents. But according to the search warrant signed by U.S. Magistrate Maher, he had been "presented with and did examine copies of the magazines and motion picture films" which had been intercepted and whose seizure was authorized (App. at A-93).

However, at trial, the magistrate admitted that he had not in fact examined all the magazines and films whose seizure was authorized. He had looked at only a few of the magazines; they were stacked in neat piles in cardboard containers, and he had checked the contents of the top magazine in each pile. He had viewed only three to five of the films and could recall the titles of but two films he viewed. Each of the remaining five to

seven films was "spot-checked" as follows: one of the persons who was applying for the warrant held a small portion of the 8mm wide, two hundred foot long, celluloid strip up to a light, and the magistrate looked at this miniscule sample.

On the basis of the sampling of the sought materials and the summary description of their contents in the affidavit, plus the information in the affidavit indicating that they had been transported via U.S. mail or in interstate commerce, the magistrate issued a search warrant which authorized a search of petitioner's premises and seizure of three copies of each of ten films and forty-nine magazines as well as various business records reflecting interstate or postal shipments of these films and magazines (App. at A-93 - A-94). Armed with this warrant, twenty-two federal agents, organized into six teams, descended on petitioner's premises

on March 19, 1975, and conducted a massive five-hour search.

During this first search, the agents physically seized three copies of forty-four of the forty-nine magazines listed on the warrant, and all of the ten films. In addition, they made notes of the titles and location of sixty-nine films and thirteen magazines not listed on the warrant. More than one hundred business records were physically seized, and the agents hand-copied or made notes about dozens of other records which were not seized and did not reflect the shipment of any film or magazine listed in the warrant. One FBI agent roamed the premises and took pictures during most of the day.

The following day, government officials began preparations to obtain a second search warrant to search petitioner's premises once again. Five days later, on March 25, 1975, they presented a

new affidavit to Magistrate Maher, seeking a second warrant. This affidavit comprised the only sworn testimony presented to the magistrate in connection with the second warrant.

The affidavit consisted primarily of a statement of the results of the previous search. No magazine was presented to the magistrate, nor was the content of any of the magazines or films whose seizure was sought described to him, primarily because none of the agents had viewed the contents of any of them. The magistrate was simply informed of the titles of these magazines and films, and that, as a group, their covers "vividly depicted obscene sexual activities between males and females, males and males, females and females, including acts of fellatio, cunnillingus [sic] and ejaculation, of the same kind which were seized pursuant to the [search warrant of March 18, 1975]"(App. at A-165).

On the basis of the information in this affidavit, the Magistrate authorized seizure of sixty-nine films and thirteen magazines, plus any other obscene, lewd, lascivious and filthy magazines and motion pictures (App. at A-149). In addition, the warrant authorized seizure of "documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies." Ibid. The term, affiliate, was nowhere defined nor limited in the warrant, nor was the term used anywhere in the affidavit.

The following day, a second search of petitioner's premises ensued.

Twenty-two FBI agents, two postal inspectors and one customs agent arrived at the premises of Sovereign News Company at about 10:15 a.m. with the second search warrant. The agents again thoroughly searched the entire building, this time searching through the business's books and records even more intensely than during

the earlier search. This second search lasted about five and a half hours. The physical seizures alone during this second search consisted of three copies of seven magazines and twenty-four films and more than two thousand pages of business documents.

The trial on petitioner's complaints seeking return of the seized materials lasted two weeks during which time the district court was presented with the above-described evidence. On October 15, 1975, the district court denied petitioner's motions and refused to order return of any of the materials except for a few pages of documents.

Petitioner promptly appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. However, during the pendency of the appeal, an indictment based on the seized materials was returned against petitioner and others. Accordingly, the

Sixth Circuit dismissed Sovereign News Company's appeal without prejudice on the ground that the district court's judgment was no longer a final appealable order. Sovereign News Co. v. United States, 544 F. 2d 909 (6th Cir. 1976), cert. denied, 434 U.S. 817 (1977).

On June 19, 1978, Sovereign News Company and others went to trial on the multi-count indictment which had been returned in March, 1976. On July 24, 1978, a jury acquitted Sovereign News and all other defendants in that case on all charges.

Petitioner then filed a motion in the Court of Appeals seeking reinstatement of its appeal on denial of its motions for return of property. The Court of Appeals overruled Sovereign News' motion without prejudice to petitioner's right to renew its motion in the district court and to perfect an appeal in the event that the

district court denied said motion. (App. at A-46).

On October 11, 1978, Sovereign News filed a renewed motion for return of property in the district court. By the time the hearing was held on the renewed motion, the government had returned the originals of the films, magazines and business records, but had retained copies of the seized business documents and had distributed other copies to a number of other law enforcement agencies. Petitioner, by its renewed motion for return of property, sought the return of all copies made of materials seized in March, 1975.

The district court overruled Sovereign News' renewed motion. (App. at A-42).

Petitioner once again appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals found "no constitutional error in either the issuance or

execution of either warrant," 690 F. 2d at 577 (App. at A-33); and therefore, made the return of the copies of the material contingent upon the government's failure to show that retention of said materials was necessary for a specific investigation. Id. at 578; App. at A-37. It is from this determination that petitioner seeks review.

REASONS FOR GRANTING THE WRIT

I. THE FINDING OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT THE MAGISTRATE'S MISSTATEMENT OF MATERIAL FACT WAS A TECHNICAL ERROR THAT DID NOT AFFECT THE VALIDITY OF THE WARRANT PRESENTS A QUESTION OF FIRST IMPRESSION TO THIS COURT THAT HAS BEEN DECIDED BY THE COURT BELOW IN A MANNER IN DIRECT CONFLICT WITH THE PRINCIPLES ANNOUNCED IN FRANKS V. DELAWARE, 438 U.S. 154 (1978) AND LO-JI SALES, INC. V. NEW YORK, 442 U.S. 379 (1979).

On March 18, 1975, United States Magistrate Herbert T. Maher signed the first of two search warrants at issue

here. He stated in this warrant that four days earlier, he had been "presented with and did examine copies of the magazines and motion picture films" whose seizure was being authorized by him. However, at the trial below, he admitted that he had not actually examined most of the forty-nine magazines whose seizure he authorized. Rather, he had looked only at the magazines which happened to be on the tops of the several piles of magazines presented to him. He viewed only three to five of the films and could recall the names of but two of them. And he had merely made a token "spot-check" of the other films. A small portion of each was held up to the light for him. Since the films were only eight millimeters (one-third inch) wide, discovery of their contents with the naked eye would be extremely difficult, and only a small portion of each film's two hundred foot length was even checked in this manner.

Although well aware that he had not even looked at most of the magazines, and had glanced at many of the films in, at best, a perfunctory manner, Magistrate Maher nevertheless knowingly stated that he had "examined" copies of the magazines and films whose seizure he authorized. This misrepresentation cannot be characterized as the type of innocent, negligent or reckless error produced by drafting "by non-lawyers in the midst and haste of a criminal investigation." United States v. Ventresca, 380 U.S. 102, 108 (1965).

Nevertheless, the Court of Appeals found that the warrant was not invalidated under Franks v. Delaware, 438 U.S. 154 (1978) because Franks was narrowly directed at deception of the magistrate by the affiant and therefore did not control the instant case. 690 F. 2d at 572; App. at A-13. The Sixth Circuit further held that the magistrate's misstatement was

simply a technical error that was insufficient to compromise the neutral and detached status of the magistrate as in Lo-Ji Sales, Inc. v. New York, 442 U.S. 379 (1979). 690 F. 2d at 573; App. at A-15.

Indeed, the question here presented is a novel question that has never been directly addressed by this Court. However, in determining that the misrepresentation did not affect the validity of the warrant, the Court of Appeals adopted an unnecessarily limited reading of Franks and Lo-Ji to arrive at a result in conflict with the underlying principles of these two opinions - namely that the Fourth Amendment cannot tolerate the issuance of a warrant that contains intentionally falsified information or that has been authorized by a judicial officer who is not both neutral and detached. Although Franks did concern an intentional misrepresentation by the

affiant, this Court made it clear that it was the potential mischief wrought by "the specter of intentional falsification," id., at 168, that compelled its conclusion that a defendant must be given an opportunity to challenge a warrant's veracity. The rule should be no different when the perpetrator of the falsehood is the magistrate himself - the guardian of unreasonable government intrusion as opposed to the law enforcement authorities whom the magistrate is to control.

In the present case, of course, it was the magistrate himself--the official whose constitutional role is to protect the privacy of citizens unless and until the government persuades him that it has good and sufficient cause to invade that privacy, Nathanson v. United States, 290 U.S. 41 (1933)--who perpetrated a fraud. Magistrate Maher intentionally misrepresented that he had examined all the materials authorized to be seized and had,

therefore, performed his constitutional duty "to focus searchingly on the question of obscenity," Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968), when, in fact, he had done nothing of the kind.

Thus, the warrant was cloaked with the "specter of intentional falsification" ruled fatal in Franks, and the integrity of the magistrate's role as a neutral and detached judicial officer was irreparably eroded so as to reduce the magistrate to an actual participant in the wrongdoing just as in Lo-Ji. The judicial process has been sullied by the magistrate's false statement. It is of utmost importance that this Court address this question of first impression and clarify the full scope and meaning of its decisions in Franks and Lo-Ji, so that further misinterpretation by the courts below will be averted.

II. THE DETERMINATION OF THE COURT OF APPEALS THAT PROBABLE CAUSE EXISTED FOR

THE ISSUANCE OF A WARRANT ON THE BASIS OF A GENERAL REPRESENTATION IN AN AFFIDAVIT THAT A GROUP OF FILMS AND MAGAZINES CONTAINED EXPLICIT SEXUAL ACTS, TOGETHER WITH A MAGISTRATE'S CURSORY VIEWING OF SOME OF THE MAGAZINES AND "SPOT-CHECK" OF SOME OF THE FILMS, IS NOT CONSISTENT WITH THE DECISIONS OF THIS COURT THAT IN ISSUING A WARRANT FOR THE SEIZURE OF BOOKS, MAGAZINES OR FILMS, A MAGISTRATE MUST FOCUS SEARCHINGLY ON THE QUESTION OF OBSCENITY.

This Court has repeatedly held that in the issuance of a warrant for the seizure of books, magazines or films, a magistrate may not rely upon conclusory assertions of obscenity by law enforcement officers but must focus searchingly on the question of obscenity. Marcus v. Search Warrants, 367 U.S. 717 (1961); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1973).

However, in the present case the Court of Appeals, acting contrary to this Court's directive, upheld a search warrant issued by a magistrate supplied with neither sufficient information to assess whether the materials were obscene or not, nor with personal knowledge gleaned from a meaningful examination of the materials to make any such assessment. Rather, the affidavit in support of the first warrant lumped together all the films and magazines and represented that they contained explicit depictions of ultimate sexual acts. The magistrate had no information to evaluate the materials in the context of the guidelines established by this Court in Miller v. California, 413 U.S. 15, 24 (1973).

Nor were the deficiencies of the affidavit remedied by the magistrate's personal viewing of some of the materials. He looked at only a few of the magazines and viewed only three to

five films. The "spot-check" of the remainder of the films was meaningless because it was impossible to discern with the naked eye what was occurring in a negative which was one-third of an inch wide.[1] Furthermore, only a small portion of the two-hundred foot length of each film, as chosen by the prosecution, not the magistrate, was viewed at all. The consideration afforded the question of the obscenity of the films and magazines by the magistrate fell far short of the constitutionally required searching

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[1] In Walter v. United States, 447 U.S. 649 (1980), this Court acknowledged the futility of this procedure, stating:

> "Each reel was eight millimeters in width. Petitioner Walter informs us that, excluding three millimeters for sprocketing and one millimeter for the border the film itself is only four millimeters wide. Brief for Petitioner in No. 79-67, n. 8. Since the screens depicted within the frame are necessarily even more minute, it is easy to understand why such films cannot be examined successfully with the naked eye. Id., at 652, n. 2 (Emphasis added).

focus. Having only incomplete descriptions and having conducted the most cursory of examinations, the magistrate issued the first warrant absent a showing of probable cause, in violation of the Fourth Amendment.

The affidavit's perfunctory description of the contents of materials claiming First Amendment protection, even when coupled with a small sampling of such materials, was constitutionally inadequate. Accordingly, petitioner requests that this Court grant its Petition for a Writ of Certiorari to review the important constitutional issue raised.

III. THE AFFIDAVIT GIVEN TO SUPPORT THE SECOND SEARCH WARRANT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE AND CONTAINED INFORMATION UNLAWFULLY OBTAINED BY THE GOVERNMENT AND THEREFORE, THE ISSUANCE OF THE SECOND WARRANT WAS EXECUTED IN CONTRAVENTION OF THE VERY ESSENCE OF FOURTH AMENDMENT PRINCIPLES AS ANNOUNCED BY THIS COURT.

A. The Practice Of Extensive Notetaking And Copying Of Documents Not Encompassed In A Search Warrant During The Execution Of A Warrant For Other Listed Documents By Law Enforcement Authorities Has Never Been Condoned By This Court.

In advance of the search, the agents participating in the first search of Sovereign News Company's premises were given pads and pencils and were instructed to search for and write down the title and location of magazines and films, not listed in the first warrant, whose covers depicted "hard-core pornography." The agents were also instructed to search for records outside the scope of the first warrant and to take notes on the contents of those records.

Following these instructions, the agents wrote down the titles and locations of sixty-nine films and thirteen magazines not listed in the warrant. They also hand-copied the contents of dozens of

business records whose seizure was not authorized by the warrant. These notes were then incorporated to form the bulk of the affidavit in support of the second search warrant.

This Court has never condoned, either explicitly or implicitly, the practice of taking notes regarding documents beyond the scope of the warrant under which the search is proceeding, particularly where such information is to be used as the basis for probable cause in an affidavit to support a second warrant to search the same premises. Rather, the case authority suggests that the practice is violative of Fourth Amendment principles.

The Fourth Amendment applies to the seizure of intangibles, as well as tangibles. Katz v. United States, 389 U.S. 347, 353 (1967). Indeed, the court below, a number of years earlier, invalidated a search warrant issued as a result of notes taken by searching

officers during a prior search. United States v. Gray, 484 F. 2d 352 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974). The court found that the taking of notes clearly constituted a seizure. Because the notes taken by the officer constituted the basis for issuing a second warrant, the court found the second warrant to be impermissibly tainted. Id. at 356.

The Court of Appeals' approval of the notetaking procedure in this case carries grave consequences. Under the opinion of the court below, law enforcement authorities may enter an individual's premises armed with a very narrow, well-defined warrant and in the face of such warrant, copy down descriptions and verbatim passages from an individual's private papers and use these notes in support of a second warrant. Thus, the government may accomplish indirectly what it may not do directly - viz. conduct a

general exploratory search. The Fourth Amendment cannot tolerate such a contortion of its principles.

B. Because the Affidavit in Support of the Second Warrant was Based in Large Part on Information Seized Unlawfully During the First Search, the Second Warrant and Search was Tainted with Illegality.

The affidavit signed by Agent Grotz to obtain the second warrant was based, in large part, upon the notes taken by the agents of films, magazines and business records inspected during the first search but whose seizure was not authorized by the first search warrant. Agent Grotz, in his affidavit, recited the titles of the sixty-nine films and thirteen magazines which had been noted during the first search and stated that the covers of these materials vividly depicted certain ultimate sexual acts. He also described,

and in some cases, set forth verbatim, the contents of numerous business records which had been hand-copied during the first search. On the basis of this information, the magistrate issued the second search warrant.

The taking of notes during the first search constituted an unlawful seizure. Because the second warrant was obtained on the basis of this information gained by this unlawful seizure, the second warrant and the search executed under its authority was tainted with illegality.

C. In Justifying The Note-taking Procedure Employed During The First Search On The Basis Of The Plain View Doctrine, The Court Below Ignored The Requirements That The Discovery Be Inadvertent And That The Incriminating Nature Of The Evidence Be Readily Apparent. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

This Court has ruled that law enforcement authorities need not obtain a

separate warrant for those incriminating items which are discovered in plain view. In order to fall under the plain view doctrine, three criteria must be satisfied: (1) the initial intrusion must be lawful; (2) the incriminating character of the material must be readily apparent; and (3) the discovery must be inadvertent. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

In the present case, the magazines, films and business records of which the agents took notes were not discovered inadvertently nor was it immediately apparent that these documents constituted incriminating evidence. And, as already urged, see pp. 18-22, inter alia, the initial entry onto the premises of Sovereign News was unlawful.

1. The Discovery was not Inadvertent.

The discovery of the magazines, films and business records which the agents

noted during the first search was by no means inadvertent. The agents specifically intended to search for magazines, films and records not identified in the warrant, but which they knew were on the premises and intended to effect a seizure of the information contained in the business records. In fact, they were instructed as such before the search ensued.

The Court of Appeals' characterization of the agents' well-mapped program to search for and seize this information as a "suspicion" or "hunch" ignores reality. In effect, the court below has written out the requirement of inadvertence contained in the plain view doctrine as announced by this Court in Coolidge v. New Hampshire, supra.

2. It was not Immediately Apparent that the Evidence was Incriminating.

Not only was it not readily apparent

that the films and magazines noted by the agents were incriminating evidence, but in fact the agents had no probable cause to believe they were incriminating. Only a judicial officer is qualified under the Fourth Amendment to make a judgment of obscenity. Marcus v. Search Warrants, supra; Lee Art Theatre, Inc. v. Virginia, supra; Roaden v. Kentucky, supra; Heiler v. New York, supra. Moreover, this judgment requires consideration of the work as a whole, not just its cover. See, Miller v. California, supra.

Similarly, the agents lacked probable cause to believe that the business records which they had hand-copied constituted evidence of a federal crime. This is because the business records were incriminating only if the films and magazines to which they related were obscene, a determination which, as just noted, the agents were not qualified to make.

Furthermore, even if the information contained on the film boxes, magazine covers and in the business records had been incriminating, that fact could not have been immediately apparent to the agents. It could only have been ascertained by a close inspection of the film boxes and magazine covers and a thorough reading of the business records.

The Court of Appeals seemingly overlooked this important element of the plain view doctrine in justifying the notetaking procedure. In order to preserve the plain view doctrine as announced by this Court, and thereby accommodate both the investigative efforts of law enforcement authorities and the rights of individual citizens, this Court must provide guidance regarding the individual requirements of the plain view doctrine and their continued viability.

D. The Affidavit In Support Of The Second Search Warrant Did Not

Permit The Magistrate To Focus Searchingly On The Question of Obscenity.

No probable cause existed for the issuance of the second search warrant. Indeed, the court of appeals acknowledged below: "Since the underlying affidavit, in the present case, provided only the titles and descriptions of the materials' covers, the second warrant, when viewed alone, would fail the constitutional test." 690 F. 2d at 575; App. at A-24 - A-25.

The affidavit for the second search warrant contained no information concerning the contents of the films and magazines whose seizure was sought. It simply listed their titles and stated that the covers of the magazines and the boxes in which the films were in portrayed certain sexual acts. That meager information altogether failed to establish probable cause to believe that the films

and magazines were obscene. And in the absence of probable cause to believe that the films and magazines were obscene, there was no probable cause to believe that the business records relating to the films and magazines would be evidence of a federal obscenity offense.

Nevertheless, the Court of Appeals found that because the same magistrate had acquired certain knowledge about the nature of the materials seized in the initial search, the deficiencies in the second warrant could be ignored. Id. The Court of Appeals reached this decision despite the magistrate's disclaimer of reliance upon any information other than that set forth in the affidavit.[2] This bootstrap procedure is wholly at odds with

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[2] In addition to being constitutionally inadequate, petitioner asserts that the inference of knowledge by the Court of Appeals is contrary to Rule 41(c) of the Federal Rules of Criminal Procedure.

the Fourth Amendment and with the decisions of this Court.

The facts in the instant case present a scenario similar to those in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). In Lo-Ji, a police officer purchased two films from an adult bookstore and presented them to a magistrate for his viewing. The magistrate viewed the two films in their entirety and concluded that they were obscene. The police officer duly recited all of these facts in an affidavit offered to obtain a search warrant. The police officer also alleged in his affidavit that the bookstore had on its premises films and magazines which were similar to and portrayed sexual activities similar to those depicted in the two films which the magistrate had found to be obscene. This Court determined that those facts failed to establish probable cause to believe that any materials other than the two

films viewed by the magistrate were obscene. Specifically, this Court stated:

> This search began when the local justice and his party entered the premises. But at that time there was not sufficient probable cause to pursue a search beyond looking for additional copies of the two specified films, assuming the validity of searching even for those.

442 U.S. at 325. (Emphasis added).

The important question here is: What evidence did the magistrate have before him on which he could determine whether probable cause existed to issue a search warrant for the items sought to be seized? The answer is that he merely had a description of the titles and covers of the materials - a description that indicated absolutely nothing about the contents of any of the materials as a whole. See, Miller v. California, 413 U.S. 15, 24 (1973). No prior knowledge of the materials held on the company's premises nor any after-the-fact knowledge acquired by the magistrate could suddenly create

probable cause where none existed in the first instance. Indeed, that was the primary teaching of this Court's decision in Lo-Ji.

Accordingly, petitioner comes before this Court seeking review of the Court of Appeals for the Sixth Circuit and requests this Court to give instruction and guidance on what information is required in order to allow the magistrate to focus searchingly on the material's alleged obscenity.

IV. AN IMPORTANT QUESTION IS PRESENTED, UPON WHICH THERE IS CONFLICT AMONG FEDERAL COURTS OF APPEAL, CONCERNING WHETHER A COURT CAN ALLOW THE GOVERNMENT'S USE OF CERTAIN MATERIALS SEIZED PURSUANT TO AN OVERBROAD WARRANT BY REDACTING THE OVERBROAD LANGUAGE AFTER THE SEARCH HAS BEEN CONDUCTED.

The warrant under which the second search ensued authorized the seizure of the following:

> Obscene, lewd, lascivious and filthy magazines and motion

> picture films, included, but not limited to, the items listed in Exhibit A attached to this search warrant, and records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation receipt and shipment of the aforementioned obscene material in interstate commerce or by the U.S. Postal Service.

App. at A-148 - A-149 (Emphasis added).

The court below acknowledged that the language contained in the warrant was overbroad, but determined that rather than invalidate the entire warrant, it would "sever and invalidate those portions containing the overbroad language and allow the items seized under the proper section to stand as evidence." 690 F. 2d at 576; App. at A-30. Thus, the court upheld a warrant which authorized a general exploratory search expressly forbidden by the Fourth Amendment and justified its conclusion by severing the offending language after the fact.

Although such a procedure has never been approved by this Court and would appear to be in complete contradiction to Fourth Amendment principles, a number of other circuit courts have indulged in this redaction process in order to permit the admission of some of the fruits of an illegal search into evidence. United States v. Espinoza, 641 F. 2d 153, 164-165 (4th Cir. 1981); United States v. Cook, 657 F. 2d 730, 734-735 (5th Cir. 1981); United States v. Christine, 687 F. 2d 749, 759 (3rd Cir. 1982); United States v. Tamura, 694 F. 2d 591, 597 (9th Cir. 1982), while the other circuits have not justified the admission of materials seized under an overbroad warrant by after-the-fact severance. See, Application of Lafayette Academy, Inc., 610 f. 2d 1 (1st Cir. 1979); United States v. Marti, 421 F. 2d 1263 (2d Cir. 1970); United States v. McSurely, 473 F. 2d 1178 (D.C. Cir. 1972).

The procedure of allowing the Government to use and retain materials seized pursuant to an admittedly overbroad warrant seriously erodes the rights the Fourth Amendment was designed to secure, the most basic of which is freedom from general warrants permitting the government to search where they please, for whatever they please. See, Coolidge v. New Hampshire, 403 U.S. 443 (1971). The particularity requirement of the Fourth Amendment stands as a constitutional protection against the unchecked abuses attendant to the use of general warrants. Boyd v. United States, 116 U.S. 616 (1886); Marcus v. Search Warrants, 367 U.S. 717 (1961); Stanford v. Texas, 379 U.S. 476 (1965); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). Yet the redaction procedure adopted by the court below, together with the Third, Fourth, Fifth and Ninth Circuits, completely sidesteps this vital constitutional

requirement. In effect, these courts have chosen to rewrite the warrant after the illegal search has already ensued in order to justify the seizure of certain materials, which was the very practice condemned by this Court in Lo-Ji Sales, Inc. v. New York, 3442 U.S. 379 (1979).

The court below gave great weight to the fact that the only magazines and films seized pursuant to the general warrant were all among those identified by title in Exhibit A attached to the warrant. From this fact, the Court of Appeals concluded that the general warrant could be upheld because it did not result in a general search and seizure. Thus, the court below did precisely what this Court has expressly prohibited - it justified the search and seizure on the basis of "what it turn[ed] up." Bumper v. North Carolina, 391 U.S. 543, 548, n. 10 (1968); Byars v. United States, 273 U.S. 28, 29 (1927); United States v. Di Re, 332 U.S.

581 (1948); Henry v. United States, 361 U.S. 98, 103 (1959).

It is clear that the lower courts are in a somewhat confused state regarding the proper remedy when a search is conducted pursuant to an overbroad warrant. The redaction procedure adopted by the court below poses a serious threat to the Fourth Amendment's protection against the abhorred general warrant. Any prophylactic effect posed by the Fourth Amendment to unreasonable searches is completely eroded by this procedure; essentially the government is permitted to trim down the warrant to constitutional size after the fact while still allowing the government to conduct a broad exploratory search during the course of which they can pick and choose the evidence they want. The increasing acceptance of this "end-justifies-the-means" procedure by the various courts of appeals calls for this Court to examine

the propriety of such a procedure within the confines of the Constitution and provide guidance regarding its use.

V. AN IMPORTANT QUESTION IS PRESENTED AS TO WHICH LOWER COURTS ARE IN CONFLICT AS TO WHETHER A GENERIC DESCRIPTION OF BUSINESS DOCUMENTS IS SUFFICIENT TO SATISFY THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT.

The court of appeals implicitly recognized that the description of business records to be seized contained in the warrant (App. at A-149) was in very general, vague language, but determined that because business records "do not enjoy the same level of First Amendment protection as non-obscene books and magazines" 690 F. 2d at 576; App. at A-32, the generic description used was sufficient to comply with the Fourth Amendment's particularity requirement.[3]

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[3] The court below has completely overlooked the fact that the business records in question were necessary to the prosecution of petitioner on the basis of (Footnote Continued)

Although generic descriptions have, at times, been deemed to be sufficient under the Fourth Amendment, such descriptions have generally been upheld when the material was contraband or stolen property - not legitimate business documentation. See, e.g., Steele v. United States No. 1, 267 U.S. 498 (1925) ("cases of whiskey"); United States v. Davis, 542 F. 2d 743 (8th Cir.), cert. denied, 429 U.S. 1004 (1975)("$5,815.25, part of which is bait money"); United States v. Scharfman, 448 F. 2d 1352 (2d Cir. 1971), cert. denied, 405 U.S. 987 (1972)("fur coats, stoles, jackets and other finished fur products, books, records and other fruits and

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First Amendment materials. Thus, these business records enjoy as delicate a position as the materials themselves. This fact strengthens the positions of the decisions in conflict with the court below when applied to the present case. See, United States v. Roche, 614 F. 2d 6 (1st Cir. 1980); United States v. Abrams, 615 F. 2d 541 (1st Cir. 1980); United States v. Crozier, 674 F. 2d 1293 (9th Cir. 1982).

instrumentalities"). When confronted with a search warrant's generic description of day-to-day business records, lower courts have ruled generic descriptions overbroad - contrary to the decision of the court below. United States v. Roche, 614 F. 2d 6 (1st Cir. 1980)("books, records, documents, consisting of but not limited to insurance applications, premium notices, claims requests for recovery, correspondence relating to applications and claims, policies, ledger sheets, invoices, account journal and office week ending progress reports which are evidence, fruits and instrumentalities of the violation of Title 18, United States Code, Section 1341"); United States v. Abrams, 615 F. 2d 541 (1st Cir. 1980)("certain business and billing and medical records of patients of Doctors Abrams, London, Braun and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed

to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001"); United States v. Crozier, 674 F. 2d 1293 (9th Cir. 1982) ("any indicia of ownership and control of the premises").[4] The court in United States v. Abrams, supra, explained:

> The use of "common sense" does not eliminate the requirement for specificity in the warrant. Using the rubric "common sense", the government would return us to the general warrant era...The warrant as drawn left it entirely up to the discretion of the officers to determine what records to seize. Since they had no guidance at all, they seized them all. This may

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[4] Each of the courts in Roche, Abrams and Crozier found that the language of the warrant was far broader than that contained in the warrant in Andresen v. Maryland, 427 U.S. 463 (1976). Petitioner asserts that the language contained in the warrant in the case at bar was similarly insufficient to control the discretion of the searching agents.

> have been prudent, but it was also unconstitutional.

Id., at 544.

When the decision of the court below is contrasted with the decisions in United States v. Roche, supra; United States v. Abrams, supra; and United States v. Crozier, supra, it becomes apparent that these courts are in conflict in their interpretation of precisely when compliance with the particularity requirements of the Fourth Amendment is achieved.

The question regarding the permissibility of generic descriptions of business documents in meeting the particularity requirements demands clarification. The inconsistent decisions of the courts below reflect the need for instruction to law enforcement authorities as to precisely what type of description of materials is necessary for compliance with the Fourth Amendment. This case

presents the opportunity for this Court to consider the demands of the particularity requirement and to resolve the conflict in the lower courts as to what the Fourth Amendment requires.

VI. FEDERAL AGENTS CONDUCTED A BAD FAITH, GENERAL SEARCH OF PETITIONER'S PREMISES.

Having intercepted several shipments of films and magazines from plaintiff Sovereign News Company, and having then obtained a narrow search warrant authorizing seizure of these films and magazines, as well as documents reflecting their interstate transportation, federal agents proceeded to use this warrant "as a ticket...to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled power of a general warrant." Stanley v. Georgia, 394 U.S. 557, 572 (Stewart, J., concurring, 1969). They then obtained a second, much broader warrant, returned to plaintiff's premises, again engaged in "unconfined

searches," and this time greatly increased their "indiscriminate seizures." These two searches, when viewed together, or when viewed separately, were clearly general searches designed and conducted "in the hope that evidence of crime might be found." Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); accord, United States v. Rabinowitz, 339 U.S. 56, 62 (1950); Kremen v. United States, 353 U.S. 346 (1957); Von Cleef v. New Jersey, 395 U.S. 814 (1969); Lo-Ji Sales, Inc. v. New York, supra. The intolerable scope and intensity here was particularly indefensible because it was premeditated. The agents deliberately chose to use the first search as a vehicle for a second search. They had decided in advance to seize, make note of, or photograph anything which would help them in their investigation, and they followed this plan at both searches.

The agents added a new wrinkle to the fabric of exploratory searches. Instead of physically seizing all items uncovered during their initial exploration of petitioner's premises, which they knew they could not justify constitutionally, they made notes about them and then obtained a second warrant for their seizure. But this efort to adhere to procedural regularity did not alter the substantive exploratory, rummaging character of the searches. The Fourth Amendment does not allow the use of alternative devices to seize materials. That which may not be obtained directly may not be acquired indirectly. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

By the time the second search was finished, virtually every nook and cranny of petitioner's three-story premises had twice been thoroughly searched. The reception area, offices, and warehouse area had all been combed for ten hours by

more than a score of agents. Over two thousand pages of business documents had been seized, most of these under the second warrant, a general warrant which authorized seizure of nearly every document on the premises. Three copies of thirty-five films and fifty-one magazines had been seized.[5] Twenty-five of the films and thirteen of the magazines were seized under authority of the second warrant, which had been issued on the basis of information obtained by the illegal notetaking during the first search, and without probable cause.

Many of the business documents seized were taken despite the agents' awareness that they were outside the scope of the warrant they were supposedly executing. As Agent Grotz admitted, they did not feel

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[5] Many of these items were later offered as evidence at petitioner's criminal trial which resulted in a jury determination that the materials were protected by the First Amendment.

themselves bound by the language of the warrants. When they came across documents which were particularly far beyond the warrant authorization, such as credit card numbers, or of a sensitive nature, such as attorney-client letters, they copied them if they felt they might be useful to their investigation. This copying, which was a seizure within the meaning of the Fourth Amendment, United States v Gray, 484 F. 2d 352 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974) was as violative of plaintiff's privacy as the physical seizure of documents.

The excesses indulged in by the agents established an unreasonable search, in violation of the Fourth Amendment. See, e.g., Go-Bart Importing Co. v. U.S., supra; Kremen v. United States, supra; Von Cleef v. New Jersey, supra; Lo-Ji Sales, Inc. v. New York, supra.

The government has introduced a novel approach to circumventing Fourth Amendment

mandates under the guise of so-called "innocent" notetaking. But the fact remains that these searches were general exploratory searches - the very evil the Fourth Amendment was drafted to prevent. In view of the novelty of the government's approach and the substantial threat posed to the Fourth Amendment by these novel, but no less illegal, procedures, petitioner respectfully requests this Court to grant its Petition for a Writ of Certiorari.

CONCLUSION

The record in this case demonstrates a clear attempt by the government to overrun Fourth Amendment strictures which the founding fathers and years of intervening case law have determined to be necessary limitations on police behavior in a free society.

The imaginativeness of its technique ought not to obscure the danger of allowing the government to profit by its

deliberate bypass of constitutional command.

In a bifurcated attempt to circumvent legitimate limitations on their conduct, government law enforcement officials first entered plaintiff-appellant's warehouse under a warrant which was defective not only because it was issued without a predicate showing of probable cause, but because the magistrate who issued it compromised his neutrality by making a materially prejudicial misstatement of fact on the warrant itself. Thereafter, and as a part of its total design to avoid its Fourth Amendment responsibilities, the officers reentered the warehouse under the authority of an overbroad warrant issued without probable cause and on the basis of information improperly obtained in the first search. Their subsequent search and seizure was so broad, so massive, so far beyond the reasonable scope of the authority of the warrant as to constitute

a bad faith general search. The court below gave judicial imprimatur to this governmental misconduct despite clear constitutional repugnance to the invasion of privacy so clearly depicted in this record.

It remains for this Court, if it intends to keep the Fourth Amendment from becoming no more than a precatory promise, an historical curiosity, to renounce as unconstitutional the searches and seizures which occurred in this case.

Petitioner respectfully urges this Court to grant its Petition for a Writ of Certiorari.

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